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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1590

MORRISON HAMLETT,

Petitioner,

vs.

CONCO, INC.,

Respondent.

REPLY BRIEF FOR THE RESPONDENT, CONCO, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MONTGOMERY KNIGHT, JR.
Doumar, Pincus, Knight & Harlan
1350 Virginia National Bank Building
Norfolk, Virginia 23510
Attorney for Respondent

QUESTIONS PRESENTED

I. DID THE COURT FAIRLY HANDLE QUESTIONS RELATING TO CERTAIN SAFETY CODES AND STANDARDS OF A VOLUNTARY ASSOCIATION PROMULGATED AFTER 1942, IN 1967, ETC. (NOT HAVING THE FORCE AND EFFECT OF LAW) WHEN VIEWED IN LIGHT OF THE TESTIMONY OF THE EXPERTS ADDUCED?

II. DID THE TRIAL COURT PROPERLY EXERCISE ITS DISCRETION ON VOIR DIRE INVOLVING INQUIRIES AS TO THE FORMER OCCUPATIONS OF RETIRED PERSONS AND THE OCCUPATIONS OF THE HUSBANDS OF FEMALE JURORS?

III. DID THE COURT PROPERLY CHARGE THE JURY UNDER VIRGINIA LAW AS TO THE PAINTER"S DUTY OF CARE (ERRONEOUSLY REFERRED TO IN QUESTION VI OF THE PETITION AS A CHARGE RELATING TO CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK)?

IV. ARE THE ISSUES RAISED BY PETITIONER MOOT WHERE (a) THE CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS, (b) THE CRANE WAS REFABRICATED BY GLOBE IRON, RELIEVING CONCO, INC. OF LIABILITY, (c) THE PAINTER WAS NOT AN INDIVIDUAL IN PRIVITY "REASONABLY TO BE AFFECTED BY" THE CRANE, AND (d) THERE IS NO PROOF AS TO HOW THE ACCIDENT HAPPENED?

STATUTES

The following sections of the Code of Virginia of 1950, as amended, are involved:

§8-24.2. Certain actions for damages arising out of defective or unsafe condition of improvements to real property. -- No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an

improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of said injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property more than five years after the performance or furnishing of such services and construction. This limitation shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought. (1964, c. 333; 1968, c. 103.)

§ 8.2-318. When lack of privity no defense in action against manufacturer or seller of goods. -- Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods; however, this section shall not be construed to affect any litigation pending on June twenty-nine, nineteen hundred sixty-two. (Code 1950 (Suppl.), Sec. 8-654.3;1962, c.476;1964, c.219.)

STATEMENT OF THE CASE

This is a personal injury case involving principles of state law which was submitted to a jury in the Federal District Court for the Eastern District of Virginia, Norfolk Division. After deliberation, the jury returned its verdict in favor of the defendant crane manufacturer, Conco, Inc. A motion to set aside the verdict was overruled by the Honorable Walter E. Hoffman, United States District Judge, and judgment was entered on the verdict of the jury. The petitioner in this cause thereupon appealed to the Fourth Circuit Court of Appeals, and Conco, Inc. cross-appealed, arguing that the cause should have never been submitted to the jury in the first place, and that the petitioner was barred by the Statute of Limitations, that the crane had been refabricated by a third party as a matter of law, etc. The Court of Appeals for the Fourth Circuit affirmed the judgment of the lower court, holding that there had been a fair trial.

Some reference to the facts of this case is

deemed necessary to bring this personal injury case into focus.

In 1942, Conco, Inc., a crane manufacturer whose principal offices were and are Mendota, Illinois, was requested to design and manufacture a 10-ton overhead crane for use by the United States Government in a U.S. Army Ordnance Machine Shop at Fortress Monroe, Virginia, pursuant to certain specified Army requirements. Construction plans for an extensive addition to the Ordnance Machine Shop (including the crane) dated November 8, 1941 have been located and were introduced into evidence. (D. Exh.2.) These construction plans reflect an overhead crane and attendant rails, wires, etc., which overhead crane was to be 17 feet above the ground in a room 30 feet in width, spanning from wall to wall, which crane was specifically designed for permanent installation in the facility. The 10-ton crane in question was one of a large number manufactured and sold by Conco, Inc. for Army Ordnance Repair Shops throughout the country in World War II. (R. 192 and 193.)

In 1966, twenty-four (24) years after the purchase by the Army of such a crane, the Ordnance Machine Shop at Fortress Monroe, Virginia, was converted into an Automatic Data Processing Center. Plans for the conversion were introduced into evidence. (D. Exh. 4 and 5.) At conversion time, invitations for bids were received from local contractors for the dismantling, disposal, and removal of everything that was in the Ordnance Machine Shop. Cochran Construction Company of Hampton was the prime contractor in the dismantling. Riggins & Company, Inc. of Hampton acquired the rights to the crane from Cochran and Company, Inc. after Cochran had dismantled the Ordnance Machine Shop.

Thereafter, on August 29, 1966, Globe Iron Construction Company, Inc., a large steel fabricating plant in Norfolk, Virginia, purchased the crane from Riggins and Company, Inc. (D.Exh. 23.) Conco, Inc. (hereinafter referred to sometimes as Conco) had not been notified by the United States Government nor by Riggins prior to the time of the

dismantling of the crane and removal thereof from Fortress Monroe, Virginia, that the crane would be dismantled and removed from its location in the Ordnance Machine Shop.

When Globe Iron Construction Company, hereinafter referred to as Globe Iron, a steel fabricator, purchased the crane from Riggins, it refabricated the crane into a new and different crane and affixed it in its plant. It lengthened the span from 30 feet to 45 feet, it reduced its capacity from a 10-ton crane to a 5-ton crane and re-labeled it accordingly (altering its speed and other attributes); it caused or permitted to be installed wooden bumpers on the crane, it installed a particular type of warning device on the crane, added splice plates on the bottom of the girders, and it further completely changed the type of pendant control on the crane. (The crane's pendant control as originally manufactured was stationary in nature and extended in 6 feet from one side thereof.) Globe Iron removed the stationary pendant control and installed a pendant

control which ran on a track which would permit an operator to move the pendant control from one side of the crane to the other. (R. 54, 45, 48, 73, 74.) Conco was at no time advised of these changes and the refabrication of the crane and its new physical configuration, its new location on the premises of Globe Iron, its width in the plant of Globe Iron, its height, its accessibility, etc. Called as a witness for the plaintiff, the plant engineer for Globe Iron who had supervised the refabrication of the crane testified that in his opinion it was "safe". (R.88.) After refabricating the crane, Globe Iron installed it on rails in an open part of its plant 24 feet 1 inch from the ground. (R. 64.)

In 1968, J. H. Steen & Sons, Painting Contractors, contracted with Globe Iron to do some painting on its premises. Morrison Hamlet, the plaintiff, was a painter working for J. H. Steen. Mr. Garnes, the supervisor on the job for Mr. Steen, testified that he specifically cautioned Mr. Hamlet about the cranes and the

hotwires. (R. 110.)

On July 19, 1968 (26 years after the manufacture of the crane) the plaintiff, Hamlet, was asked by his fellow workmen to help with some painting on the guttering on the building at Globe Iron. His fellow painters did not want to use the ladders because it would have been too much trouble for them to get the ladders as they were around on the other side of the building. (R.112.) Therefore, they and Hamlet went up on a column that was not intended to be used for climbing. The column had spaces in it, however, and Hamlet was able to get to the top of the column by using these spaces. (R.67.)

According to Hamlet, as he got to the top no sooner than he laid his right hand on the track, "it hit me" and he grabbed the column with his left hand to keep from falling. (R.68.) The painter, Hamlet, testified that he never saw the crane itself and that it happened so fast that he never saw it. There was no witness to the accident. There is no testimony of record

from Mr. Hamlet or any other individual as to whether a wheel struck Mr. Hamlet (if so, which wheel) or any other facts as to this accident. (R.69.)

Clinton Lee, the operator of the crane at the time of the accident, did not see the accident. He was operating the pendant control (which had been refabricated by Globe Iron as aforesaid, and which had been changed from a stationary pendant control to a movable one which would permit the operator to move on the ground back and forth from one side of the crane to the other). Mr. Lee marked a photograph reflecting that he was about in the middle of the width of the crane while operating with this changed pendant control. (R. 115, 116, 117, D. Exh. 16.) The uncontradicted testimony of Mr. Howard Bansau (a former president of the Crane Manufacturing Association) who was employed by Conco at the time of the construction of the crane in 1942 was that the change of the pendant control from a stationary control, 6 feet from the end of the

span to a movable control (operated in the middle of the crane) would certainly affect the visibility of the crane operator in that he would be considerably closer to the object with the pendant control in its originally manufactured position. (R.198.)

Before the trial, the defendant, Conco, Inc. moved the court for summary judgment on the grounds that Globe Iron Construction Company had exercised dominion over the crane, refabricating the same to its own use in an entirely different location without notification to Conco, Inc. and that there should be no liability for Conco, Inc. under these circumstances. Furthermore, in its motion for summary judgment Conco, Inc. also relied upon the Statute of Limitations (which had been affirmatively pleaded). (R.9, 11.) This motion for summary judgment was overruled by the Court, to which action Conco assigned as cross-error in the court below.

The plaintiff's experts testified that "rail sweeps" should have been manufactured in

front of the wheels. At this point, it is emphasized this was not a gantry crane, but an overhead crane, 24 feet above the ground. The testimony of H. A. Schaill, whose engineering qualifications are far superior to those of the plaintiff's "experts" testified that had there been a rail sweep in front of a wheel, and if such a rail sweep were to have struck the hand, that it would have either ripped the hand off and mangled it or thrown Mr. Hamlet to the ground, 24 feet below. (R. 180, 181, 186, 187.) (Mr. Bishop, an "expert" called by the plaintiff, who was a rigger in World War II, said that the hand would have been brushed aside.) (R.87.)

As to the use of a rail sweep, it is uncontradicted that it was not the custom in the industry in 1942 for such a rail sweep to be put on an overhead crane, (R.171.) (Nor did the U. S. Army so specify on these "World War II" cranes specifically designated for their Ordnance Depots.)

C. P. Hearne of the Virginia Department of

Safety Inspection, who has been in the business for 24 years, testified in his opinion, the location in which it was found, the crane was safe, and that according to current Virginia Code Commission standards, a crane 7 feet or more above the ground is not required to have a rail sweep. (R.42.) Mr. Harry Keeling, an engineer who was the only witness to testify that he had in fact designed overhead cranes, stated that he was familiar with cranes in 1942 and that he would not have designed a rail sweep for this crane in 1942, and in view of its present height and location, would not design one now. (R.147, 162.)

The jury, after listening to the testimony, and the testimony of the various experts, and after having deliberated upon the same, returned a verdict in favor of the original crane manufacturer, Conco, Inc.

Conco, Inc. has contended that this case should not have gone to the jury in the first place, but, having been submitted to the jury

with a verdict in its favor, sees no earthly reason for the Supreme Court of the United States to entertain this case where the Court of Appeals for the Fourth Circuit has held that the court and jury fairly applied principles of State law.

SUMMARY OF ARGUMENT

Petitioner, a painter who was allegedly injured by an overhead crane which had been dismantled, removed, and refabricated by a steel fabrication plant 26 years after its manufacture, received a fair jury trial in his case against the original manufacturer.

The court fairly handled questions of State law relating to safety standards of a voluntary association not having the force and effect of law, particularly where their introduction was indirectly accomplished by persistent cross-examination of experts by the painter's counsel in referring to the standards.

The court properly handled voir dire of the jury and instructed the jury in such a way that

a fair trial was accomplished.

Furthermore, under the rationale of a recent subsequent decision of the Fourth Circuit Court of Appeals, the Statute of Limitations in this case would bar a retrial of this cause (the same having expired in 1947, five years after the manufacture of the crane in 1942), rendering every issue raised herein moot.

The cause is also moot where the crane was refabricated by a third party, relieving Conco, Inc. of liability; the painter was not an individual in privity "reasonably to be affected by" the crane; and there is no proof as to how the accident happened.

The verdict of the jury should not be disturbed.

ARGUMENT

I. THE COURT FAIRLY HANDLED QUESTIONS RELATING TO CERTAIN SAFETY CODES AND STANDARDS OF A VOLUNTARY ASSOCIATION PROMULGATED AFTER 1942, IN 1967, ETC. (NOT HAVING THE FORCE AND EFFECT OF LAW) WHEN VIEWED IN LIGHT OF THE

TESTIMONY OF THE EXPERTS ADDUCED.

Petitioner contends that the subsequent safety codes were relevant to the facts of this case; however, the question of relevancy depends or varies with the facts of each case. No uniform rule of relevancy can be applied. It is within the judge's discretion to rule on the relevancy of the evidence offered in light of the facts peculiar to each case. Here Petitioner implies the court abused its discretion. We submit that it did not.

Petitioner's contention that he was prejudiced by the refusal of the trial court to permit the introduction of the A.S.A. standands is a moot point because he was able to use them in cross examination of the defendant's experts and in that way got the standards before the jury. The court's attention is invited to the testimony from page 146 to 165 of the record of Mr. Harry Keeling, an engineer, called by the defendant, Conco, Inc. Mr. Keeling is an eminently qualified engineer who has designed cranes and

has been familiar with cranes before and after 1942. He testified that an overhead crane is entirely different from a gantry crane (whose wheels run on the ground, or at arm level) that people normally might lean or fall against. Although the court had ruled that the testimony would be limited to what the custom was in 1942, counsel for the plaintiff insisted on being extremely persistent and over objection, asked if it was a fair statement that it was in general knowledge as shown in this (referring to the 1943 subsequent standard) to have a fender extending below the top of the rail. Mr. Keeling said that he would say so; however, he testified that because of the nature of the specific overhead crane, he would not have designed a rail sweep, and that he did not believe that even today one crane in ten in such locations would have rail sweeps. (R.162.) He further testified that it was not the custom in the industry in 1942 to design a rail sweep on a crane. (R.162.).

Significantly, counsel cross-examined Mr.

Keeling on the 1943 standard that was not to be admitted into evidence. On page 164 of the record Mr. Keeling testified that according to page 40 of the standard and to the "then printed hearsay" contained therein, it would apply to cranes manufactured prior to the promulgation of the Code, and that according to the 1943 standards they should be altered to suit it. Counsel for the plaintiff asked:

> "Q. A crane manufactured in 1942 should be altered to suit that; is that correct?
>
> A. According to this. (The witness referring to the 1943 A.S.A. standard)" (R.164.)

Thus, after having the witness testify from the A.S.A. publication, counsel tendered it for identification as an exhibit. The court ruled as follows:

> "I will let the testimony of Mr. Keeling remain, but I shall not permit the exhibit which is 17."

Clearly, under the circumstances, counsel accomplished indirectly through oral testimony of Mr. Keeling that which he was not permitted to

do directly, namely, to have the standards introduced into evidence; and he should not now be heard to complain where the testimony of the witness reading from the standard was permitted to stand, since the jury was permitted to take this testimony into consideration in arriving at its verdict.

Petitioner cites three cases to support his contention. None of these cases is in point because each is clearly distinguishible from the case at bar on its facts. Edmonds, Inc. v. Vojka, 332 F2d 309 (D.C. Cir. 1964) involved a stairway open to public use and which, in fact, the plaintiff was invited to use. Further, there was no evidence that the plaintiff was using the stairway improperly. The danger to persons using the stairway in a proper manner was open and immediate. Finally, there was no evidence that the stairway or any other portion of the building had been materially altered from its original form.

The evidence in the case at bar paints an

entirely different picture. Here, the allegedly dangerous instrumentality was twenty-four feet off the ground. There was no ladder up to the track where the plaintiff was injured. The fact is that plaintiff gained access to the track by climbing a column not intended for that purpose after having been expressly warned to look out for the crane! Another distinguishing feature of our case is that the crane was originally manufactured in 1942 in accordance with specifications supplied by the Department of the Army. After remaining in place for 24 years at Fort Monroe, Virginia, it was sold as surplus, completely dismantled, and then refabricated to completely different specifications by Globe Iron!

The instrumentality and the facts surrounding the plaintiff's injury are not the only distinguishing characteristics of the case at bar. The standards that the plaintiff sought to introduce are also substantially different. In Edmonds, Inc., supra, the standards introduced were those of the District of Columbia Building Code by

which the plaintiff intended to show the standard of accepted practice by which to measure the conduct of the defendant. There was no doubt that the Code's provisions constituted accepted practice since it was the law and therefore required for current and future construction, although not for past construction. In the case at bar, on the other hand, the standards submitted by the plaintiff were promulgated by a voluntary association after the manufacture of the crane. The standard itself stated that the conditions of application vary from place to place, that the Code should be liberally construed, and in cases of practical difficulty, it was expected that administrative authority would grant exceptions from the literal requirements of the code that will permit the use of alternative devices and methods that only if it is clearly evidenced that reasonable safety is thereby achieved. Mr. C. P. Hearne, the industrial safety representative employed for 29 years by the Safety Division of the Department of Labor

(constituting the administrative authority), testified in the case at bar that a code has been adopted by Virginia dealing with machinery guarding where moving machinery is no more than seven feet from the ground or floor. When such machinery is more than seven feet from the floor, there is no Virginia Industrial Safety Code requirement for guarding. (R.142.)

By the same token, the petitioner has improperly cited the Fourth Circuit case of Provenza v. American Export Lines, et al, 324 F.2d. 660, 4th Cir. Cert. Den. 84 Sup. Ct. 970, 376 U.S. 952. In Provenza the court dealt with "Safety and Health Regulations for Longshoring" promulgated by the Department of Labor under the authority of Public Law 85-742, and published under the Code of Federal Regulations. (29 CFR #9.1). Thus, Provenza in no way disturbs the admissibility of a regulation not having the force and effect of law as discussed in 75 ALR 2d 778, and the majority rule rejecting the same as to standards of voluntary association reflected in the case of

Mississippi Power and Light Company v. Whitescarver, 68 F2d 928, 5th Cir. (1934).

In the case at bar the testimony was uncontradicted from reputable representatives of both the Whiting Crane manufacturer and Conco, Inc. that the custom in 1942 was not to install rail sweeps on this type of crane. In light of this testimony, the trial court's action is supported in the case of Briere v. Lathrop Co., 258 N.E.2d 597 (Ohio 1970). There a painter brought an action against a general contractor alleging negligence in the placement of a scaffold. A party attempted to introduce into evidence suggested safety rules published by the "Steel Scaffolding and Shoring Institute," which were in effect at the time of the accident and which recommended that men not stay aloft while a scaffolding is moved. The court examined the various authorities, including certain of the cases cited by the plaintiff, and held that it was within the court's discretion to determine whether these safety rules were to be admitted

into evidence. It further stated "in light of the conflicting testimony about industry adherence to the proferred rules, we cannot say that the trial court erred in not admitting the rules in evidence." (Emphasis added.) Thus, under the decision in Briere, this court could have excluded the A.S.A. standards had they been in existence in 1942 on the grounds that the uncontradicted evidence showed that there was no industry adherence to them at that time.

The case of Noel v. United Aircraft Corporation, 342 F2d 232 (3rd Cir. 1965), cited by the petitioner involved the defective design of a device installed to control the speed of aircraft propellers. The evidence showed that the defendant was aware that in the absence of some type of control mechanism, continued use of the propeller systems designed by the defendant and used on Lockheed Constellations, commercial passenger aircraft, endangered the public. The court held therefore that "there is a continuing duty where danger of the occurrence of uncontrolled over-

speed (of the propellers) and its effects were not hypothetical but a generally recognized danger," the result of said overspeed being that the aircraft would crash.

The court in the Noel case distinguished two cases cited by the defendant, Marker v. Universal Oil Products, 250 F2d 603 (1957) and Mitchell vs. Machinery Center, Inc., 297 F2d 883 (1962), saying that these cases stood for the proposition that the manufacturer need not develop safety devices to protect against every remotely possible danger. It said that the danger of the overspeeding propeller was obvicus and known by the defendant.

It is submitted that the principle adopted in Marker and Mitchell, supra, should be applied in this case because the danger, if any, arising from the absence of rail sweeps was extremely remote since the rails, themselves, were 24 feet from the floor and not accessible to anyone using the crane in a normal manner.

Petitioner cites Boeing Airplane Company v.

Brown, 291 F2d 310 (9th Cir. 1961), in which the court held certain evidence of subsequent changes admissible "for the limited purpose of showing the practicability of the use of a safeguard." However, the court also cites in a footnote on page 315 the case of Johnson v. U.S., 270 F2d 488, 491-492 and states:

> "Where a case is being tried by a jury the trial court is entitled to weigh the need for such evidence against the risk that the jury may improperly infer negligence therefrom. Hence when the trial court excludes evidence of subsequent changes in a jury trial, its ruling will be upheld except upon a showing of abuse of discretion." (Emphasis added.)

Petitioner makes no such showing of an abuse of discretion here. His questions I, II, and III and argument in connection therewith all concern the exercise of the court's discretion in treating the standards in question, and having accomplished through oral testimony reference to the standards, Petitioner should not now be heard on their admissibility, particularly where they did not have the force and effect of law.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION ON VOIR DIRE INVOLVING INQUIRIES AS TO THE FORMER OCCUPATIONS OF RETIRED PERSONS AND THE OCCUPATIONS OF THE HUSBANDS OF FEMALE JURORS.

The trial court was eminently fair and just in its handling of voir dire of the jury panel. It acted at all times within the bounds of its considered discretion, and at no time did it abuse that discretion.

Although the petitioner claims to have been prejudiced by refusal of the trial court to permit the questions submitted, he fails to state in what way he was prejudiced. He further fails to state how that ruling was prejudicial to him but not to the defendant, or to show that he did not receive a fair trial. To support his contention of prejudice, the petitioner cites two cases. The first, Dennis v. U.S., 339 U.S. 162, 70 S.Ct. 519, 914 Law Ed. 734 (1950) stands for the proposition that "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."

With this statement no one can quarrel. However, we fail to see how this case is germane since this case involved an appeal from a conviction in a District of Columbia court of the general secretary of the Communist party of the United States for willfully failing to answer a subpoena of the House Committee on Unamerican Activities. The question addressed in that case was whether an employee of the U.S. Government serving on the jury panel was biased as a matter of law because of the political beliefs of the petitioner as a communist. There, during voir dire, the petitioner's attorney challenged for cause all Government employees on the panel. The trial court denied these challenges. On appeal the Supreme Court upheld the trial court.

The second case cited by the petitioner is Kiernan v. Van Schaik, 347 F2d 775 (3rd Cir. 1965). In that case the trial court refused to ask questions submitted by the plaintiff's attorney which inquired as to the jurors who were in the business of liability insurance, related to

someone in the business, or had read articles and periodicals which indicated a connection between insurance rates and amounts of personal injury verdicts. The basis for the refusal of the trial court to ask these questions was the existing local practice of limiting voir dire so as to deny its use to assist counsel in the exercise of preemptory challenge which drastically curtailed it in aid of the right of challenge for cause. In reversing and remanding the case the court held "the court below exercised no discretion, but applied a supposed principle of general application. The principle that followed, and its decision therefor must be reversed." In reaching its decision, however, the court did state:

> "What is here involved is the principal substantive content of the voir dire examination. In this, too, as well as in the procedural area, a wide discretion necessarily resides in the trial court which is familiar with the nature of the case, the demeanor of the prospective jurors, and the general circumstances which surround the opening of the trial. This 'broad discretion as to the questions asked' on voir dire

is 'subject to the essential demands of fairness'."

We submit that the trial court did not abuse its discretion and that the petitioner received a fair trial. See also 47 AmJur 2d Jury §201. The court made an appropriate suggestion that information concerning the jurors and their spouses was available in the marshall's office and that the bar knew of this. Also, the court referred to the possible industry of counsel in resorting to the city directories and other devices. The court agreed to ask the panel if they knew of any reason why they would be biased or prejudiced for or against the plaintiff or defendant. In the court's discretion this is all that the demand of fairness required.

III. THE COURT PROPERLY CHARGED THE JURY UNDER VIRGINIA LAW AS TO THE PAINTER'S DUTY OF CARE (ERRONEOUSLY REFERRED TO IN QUESTION VI OF THE PETITION AS A CHARGE RELATING TO CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK).

The testimony is unequivocal of record that

the painter's supervisor specifically cautioned him about the cranes and the hotwires. (R.110.) The case of Neusus v. Sponholtz, 369 F2d 259 (7th Cir. 1966) involves a plaintiff's fall from a ladder, from which following quotation is cited:

> "Where a plaintiff is thoroughly familiar with a possible hazard involved in the performance of his job and with the means to avoid such, the fact that a particular time he may have been momentarily unmindful thereof, forgetful thereof, or have overlooked the same does not absolve him from the duty of observing due care for his own safety."

In addition, the counsel for the petitioner has misled the court. Actually, the defendant had requested an assumption of the risk instruction, which instruction was refused by the court. The court then stated on page 208 of the record in its instruction:

> "Now, I want you to know that Hamlet does not, as such, assume any risk in working at the premises and painting at Globe Iron, but it is also true that if he, in climbing the ladder, had looked and seen this crane coming down and then, with knowledge of what might happen, puts his hand on that rail, while a man who wants to commit suicide can always make the grade, I guess, if he is

sincere enough about it." (Emphasis added as to portion omitted by Petitioner in quotation on page 8 of petition.)

The court, of course, had knowledge of the fact that there was direct testimony that Mr. Hamlet had been advised of cranes in the area and had been warned about the cranes and the overhead wires.

The court further instructed the jury that while contributory negligence is no defense to a claim for breach of warranty, if Mr. Hamlet fully appreciated that there was an open and obvious danger involved in the venture he undertook and if he knowingly and voluntarily exposed himself to that danger and as a proximate result thereof, he was injured, then he could not recover under any theory of negligence or breach of warranty. (R.208 and 209.)

In the case of Brockett v. Harrell Bros., 206 Va. 457, 143 S.E.2d 897, the court recognizes that contributory negligence to the plaintiff will not be material on the issue of the defendant's breach of an implied warranty of fitness.

The court goes on to state:

> "However, if the condition of the hand of which the plaintiff complains was known, visible or obvious to her, there was no liability on an implied warranty of fitness by the defendants, or either of them to her. 77 C.J.S. Sales, Section 315 p.1157, and cases there collected. See also 1 Frumer and Friedman, Products Liability Section 19.01 (3), page 488."

The court clearly and correctly instructed the jury upon the "known, visible or obvious" requirement of due care on the part of the plaintiff as set forth in the Brockett case. In Section 19.01 (3) of Frumer and Friedman, Products Liability, there are many cases cited and this duty on the plaintiff is considered sound under the Uniform Commercial Code.

In support of the Brockett decision, the case of Tomichich v. Weston-Knapp Engineering Company, 292 F.Sup.323 (D.C. Mont.1968) holds that a manufacturer has no duty to guard against obvious dangers, and cites over 15 cases supporting this position.

Of course, going beyond Brockett, there is

authority in the country that pure assumption of the risk is a defense to breach of warranty! See Prichard v. Liggett & Myers Tobacco Company, 350 F2d 479 (3d Cir. Pa. 1965), Cert. Den. 382 U.S. 984 (1966) (See page 3-23 Vol. 2 Section 16.01 (3) Frumer & Friedman.)

There are many other cases permitting the defense of assumption of the risk as an affirmative defense to breach of warranty. See Williams v. Brown Mfg. Co., 261 N.E.2d 305 (Ill. 1970); DeFelice v. Ford Motor Co., 285 A2d 636 (Conn. 1969); Preston v. Upright Inc., 52 Cal. Rep. 679 (Cal. 1966). In the Williams case, supra, the following comment is made in relation to the question to be determined by the jury on the subject of assumption of the risk as follows:

> "That determination is not to be made solely on the basis of the user's own statements but rather upon the jury's assessment of all of the facts established by the evidence. No juror is compelled by the subjective nature of this test to accept a user's testimony that he was unaware of the danger, if, in light of all of the evidence, he could not have been unaware of the hazard...; and the factors of the user's

age, experience, knowledge, and understanding, as well as the obviousness of the defect and the danger it poses... will all be relevant as to the jury's determination of the issue, if raised." (emphasis added.)

Having been fully advised of cranes in the shop by his supervisor, the jury could have totally disbelieved the testimony of the painter as to his lack of knowledge of this 5-ton crane rolling down the track and return a verdict for the defendant, which they did.

IV. THE ISSUES RAISED BY PETITIONER ARE MOOT WHERE (a) THE CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS, (b) THE CRANE WAS REFABRICATED BY GLOBE IRON, RELIEVING CONCO, INC. OF LIABILITY, (c) THE PAINTER WAS NOT AN INDIVIDUAL IN PRIVITY "REASONABLY TO BE AFFECTED BY" THE CRANE, AND (d) THERE IS NO PROOF AS TO HOW THE ACCIDENT HAPPENED.

(a) THE CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

Section 8-24.2 of the Code of Virginia of 1950, as amended, reads as follows:

"No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property ... shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property more than five years after the performance or furnishing of such services and construction. This limitation shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought." (emphasis added)

The cases of Newport News v. Warwick County, 159 Va. 571, 166 S.E. 570, 581 (1932) and Danville Holding Corp. v. Clement, 178 Va. 223, 16 S.E.2d 345, 349-50 (1941) clearly establish that the crane in the case at bar which remained in the Ordnance Machine Shop for 26 years until it was dismantled was an improvement to real property under Virginia law.

Although the defense of this Statute of Limitations was raised in the case at bar, the

Court of Appeals did not address itself thereto apparently since it felt that there had been a fair trial resulting in a jury verdict for the manufacturer anyway.

However, after the decision in the case at bar, which was rendered on January 20, 1972, this same Circuit Court of Appeals in the case of Wiggins v. Proctor and Schwartz, Inc., No. 71-1952, decided on March 8, 1972, and in holding this very Statute of Limitations, (Section 8-24.2) to be a bar, held:

> "In this diversity case we think that the district court correctly interpreted the Virginia Statute of Limitations. We affirm on the memorandum of the District Judge."

THUS, ANY ISSUE POSED BY THE PETITIONER IS MOOT IN THAT THE STATUTE OF LIMITATIONS EXPIRED IN 1947, FIVE YEARS AFTER THE DATE OF THE FURNISHING OF THE SERVICES AND CONSTRUCTION OF IMPROVEMENT TO REAL ESTATE IN 1942!

(b) THE CRANE WAS REFABRICATED BY GLOBE IRON, RELIEVING CONCO, INC. OF LIABILITY.

Conco did not manufacture a 5-ton crane

45 feet in width with a movable pendant control in 1942; Globe Iron did in the late 1960's after the crane had been relegated to surplus, dismantled, and moved to an entirely different location. Globe Iron, upon its refabrication, considered it "safe". (R. 88).

Where there is a substantial change in the condition of a product from that in which it is sold, the manufacturer may not be liable. See Section 402A of the American Law Institute's Restatement of Torts (2d), and Hatcher v. American Motors Corp., 241 S2d 147 (Miss. 1970).

In this connection, the petitioner has completely taken out of context on pages 6 and 7 of his petition the court's instruction to the jury on the subject of modifications to the crane. In reviewing the trial court's instruction to the jury, the entire charge must be taken into consideration. On pages 205 and 206 the full instruction on the subject of modifications to the crane is set forth, and the court therein states that "if the crane was completely modified and if

these modifications proximately caused or contributed to cause the accident and resulting injuries, then the responsibility of Conco would have been terminated." Thus, the jury was properly and fairly instructed on the subject of modification of the crane.

(c) THE PAINTER WAS NOT A PERSON IN PRIVITY "REASONABLY TO BE AFFECTED BY" THE CRANE.

Section 8.2-318 of the Code of Virginia of 1950, as amended, provides that lack of privity is not a defense where the plaintiff is a person whom the manufacturer "might reasonably have expected...to be affected by the goods."

It would be clearly unreasonable to hold that Conco, Inc. should be expected to portend that a painter, 26 years after manufacture, in a different location, would violate rules of safe practice and climb a column not intended for that purpose to reach a crane which had been refabricated by its new owner.

In the Virginia case of Smith v. Movers, 206 Va. 307, 142 S.E.2d 473 (1965) there is no

implied warranty in the sale of a used car. Also, following the case of Hercules Powder Co. v. Rich, 3 F2d 12 (8 Cir. 1924), cert. denied 268 U.S. 692 (1925), the Virginia rule is that where a person orders a particular article with which he is familiar, and it is sent to him, he then obtains exactly what he bought and no warranty will be implied. (See Universal Motor Co. v. Snow, 149 Va. 690, 140 S.E. 653 (1927). Since the purchaser relies on his own judgment in selecting the particular article, the vendor completely performs his obligation by sending the article.

Therefore, since no implied warranty ran between Conco and the U.S. Army (Gov't), the attempted creation of an implied warranty by statute as to a remote third party 25 years later after a resale and re-manufacture of the item would be ex post facto as to Conco, Inc. and an express abridgement of Conco's right to contract under Article I, Section 10 of the United States Constitution.

(d) THERE IS NO PROOF AS TO HOW THE ACCIDENT HAPPENED.

Mr. Hamlet had admittedly gone up a column that was not designed for climbing. He testified that his view was blocked because of the beam. (R. 129.) The only testimony as to how the accident happened is on page 129 of the record:

> "A. I laid my right hand up here to pull up. I no sooner laid my left hand, my right hand on the track, before it hit me and I grabbed the column with my left hand to keep from falling..."
>
> ***
>
> "Q. All right sir. What was the first thing you reacted to when you placed your right hand up on top of that beam?"
>
> "A. Well, that is when it was hit."
>
> ***
>
> "Q. And you never saw the crane itself; did you?"
>
> "A. No sir."
>
> "Q. It happened so fast you never saw it?"
>
> "A. No sir."

This is the sum total of the testimony in the record as to how the accident happened.

The distance between the front wheel and the rear wheel of the crane was six feet six

inches. (R. 197 and drawings in evidence) Even had rail sweeps been installed, the sweeps would have been on the fronts of the wheels. Mr. Hamlet does not state whether he placed his hand on the track between the front and rear wheel in this six foot six inch space, whether the front or rear wheel of the crane hit his hand, whether his hand was mashed by some other portion of the crane other than the wheel, and the record is totally devoid of evidence as to how the accident happened. It is entirely possible that if his hand was struck by a wheel, it resulted from his hand being placed in the space between the front and rear wheels (which was six feet six inches as aforesaid). In this event, the alleged defect of the absence of rail sweeps would have had nothing to do with the injury!

The case of Hailey v. Johnson, 201 Va. 775, 113 S.E.2d 664 (1960), restates one of the basic principles of the law of negligence which is that the mere happening of an accident is not in itself proof of negligence. This case states

"thus it is incumbent upon the plaintiff to prove by a preponderance of the evidence how and why the accident occurred... ." To the same effect the court's attention is invited to the cases of Grimstead v. Mayhew, 167 Va. 19, 187 S.E. 515 (1936); Crabtree v. Dinger, 194 Va. 615, 74 S.E.2d 54 (1953) and Boyd v. Brown, 192 Va. 702, 66 S.E.2d 559 (1951). In the case of Murphy v. Saunders, Inc., 202 Va. 913, 121 S.E.2d 375 (1961), the plaintiff who was in the defendant's market reached for a can of lemon juice stacked on the top shelf above her head. She braced herself with her hand on the shelf, and as she did the cans stacked then fell. The court in that case held:

> "The only evidence here is that the cans fell, and this does not give rise to the presumption that they were negligently stacked."

In the case of Revell v. Deegan, 192 Va. 428, 65 S.E.2d 540 (1951), the court opined in a case involving a broken bannister:

> "What caused the rail to break we do not know."

Clearly, where the plaintiff's theory is that the front wheels should have been guarded, and it is just as likely that the defendant placed his hands between the wheels as not, or that his hand was struck by some object other than a crane wheel, (neither the plaintiff nor anyone else witnessing the same), the verdict of the jury should not be disturbed nor should the matter ever again go to a jury!

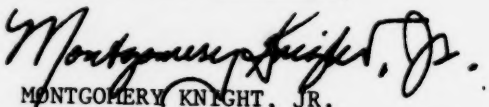
CONCLUSION

The petitioner seeks to have this court review the lower court's determinations on questions of state law which arose during a jury trial. The Fourth Circuit Court of Appeals carefully reviewed the record of the lower court and concluded that there had been a fair jury trial and that the verdict of the jury in favor of Conco, Inc. should not be reversed.

It is respectfully submitted that the factual picture presented is fully in accord with the jury verdict, that the questions of state law

relating to the verdict of the jury have been duly resolved, that the issues presented are now moot, and that the petition for writ of certiorari should be summarily denied.

Respectfully submitted,



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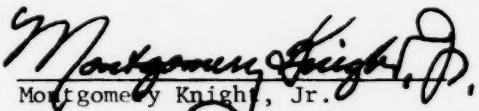
June, 1972

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on or before the date this brief was filed with the Clerk of the Supreme Court of the United States, three (3) copies thereof were served on Louis B. Fine and Howard I. Legum of the firm of Fine, Fine, Legum & Fine, 720 Law Building, Norfolk, Virginia, 23510, counsel of record for the Petitioner, by depositing the same in the U.S mails, postage prepaid, to the foregoing address.



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